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(42)

उच्च न्यायालय, छत्तीसगढ, बिलासपुर

# आदेश पत्रक

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..... विरुद्ध .....

| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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**CRIMINAL APPEAL NO.1298 of 2003**

**APPELLANTS**

1. Vipin Kumar Sahu, S/o Yogiram Sahu, aged about 23 years, R/o Village Maharajpur, P.S. Lalbag, District Rajnandgaon, at present Takapara, Rajnandgaon (Chhattisgarh).

2. Pintu @ Nepali @ Balbahadur Thapa, aged about 22 years, S/o Shyambahadur Thapa, R/o 16 Kholi, Rajnandgaon (Chhattisgarh)

**Vs**

**RESPONDENT** State of Chhattisgarh, through District Magistrate, Rajnandgaon (Chhattisgarh)

**CRIMINAL APPEAL NO.1302 of 2003**

**APPELLANT** Kumar Singh Thakur, S/o Banshi Singh Rajput, Aged about 30 years, R/o Station Para, Rajnandgaon, PS: Kotwali, District Rajnandgaon.

**Vs**

**RESPONDENT** State of Chhattisgarh, through PS: Kotwali, District Rajnandgaon (C.G.)

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**Present:**

Mr. Malay Kumar Bhaduri & Mr. Shashi K Kushwaha, Advocate for the appellants in Criminal Appeal No.1298/03.

[पीछे से जारी]

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Mr. P. Diwakar, Sr. Advocate with Mr. Adil Minhaj, Advocate for the appellant in Criminal Appeal No.1302/03.

Mr. Neeraj Mehta, Panel Lawyer for the State.

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**ORAL JUDGMENT**

**(27th September, 2007)**

**Per Dhirendra Mishra, J:**

1. Criminal Appeal No.1298/2003 & Criminal Appeal No.1302/2003 are being decided by this common judgment, as both these appeals are arising out of the judgment dated 22nd November, 2003 passed by learned Special Judge, Rajnandgaon in Special Case No.16/03 whereby learned Special Judge has convicted the appellants under Sections 294/34, 506(Part-2)/34 and 307/34 of the IPC and sentenced each of them to undergo R.I. for 3 months; R.I. for 7 years & R.I. for 10 years and to pay a fine of Rs.25,000/-, in default of payment of fine to further undergo R.I. for 2 years respectively. It has been further directed that all the sentences shall run concurrently.
2. Case of the prosecution, in brief, is that on 22.12.2002 at about 8.30 p.m. when the victim Basant Rao (PW-1) was sitting near a well at Station para, the accused persons came there. Accused

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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Vipin Sahu, who was holding sword, started abusing him with the filthy language and threatened the complainant that he will murder him. At that time, appellant Pintu @ Nepali @ Balbahadur Thapa assaulted the complainant on his mouth with fist and thereafter appellant Vipin started assaulting him with sword. He somehow could ward-off the assault with the help of his hands. Report of the incident was lodged in the Police Outpost Chikli by complainant Basant Rao himself on the same day about 5 past mid night vide Ex.P-19. He was sent for medical examination to the District Hospital, Rajnandgaon where Dr. Y.K. Tiwari (PW-6) examined him and gave his report of Ex.P-11. Reply to the query is Ex.P-12. Vide Ex.P-13 the doctor referred the complainant for X-ray examination. On the memorandum (Ex.P-17) of accused Vipin Sahu weapon of offence i.e. sword was taken into possession vide Ex.P-18.

3. After completing investigation charge sheet was filed in the court of Chief Judicial Magistrate, Rajnandgaon and the same was committed to the Court of Special Judge for trial. During trial, the prosecution examined nine witnesses in all. Thereafter, statement of accused persons was recorded in which they denied the circumstances appearing against him in

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित -५- | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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the prosecution case and pleaded innocence & false implication. However, learned Special Judge after hearing the counsel for the respective parties convicted and sentenced the appellants as mentioned in Para 1 of this judgment.

4. Learned counsel for the appellant Vipin Kumar Sahu submits that conviction of the appellant is based on the statement of complainant Basant Rao, as the other independent witnesses have not supported the case of the prosecution and they have turned hostile. He further submits that the recovery of sword on the memorandum of this appellant has not been proved, as the witnesses of memorandum and seizure have turned hostile. No charge under Section 25 of the Arms Act has been framed, which creates doubt regarding recovery of sword from the appellant Vipin Sahu.

5. Learned counsel for appellant Pintoo @ Nepali @ Balbahadur Thapa submits that no overact has been attributed to this appellant except that the complainant has alleged that he gave one blow with the fist on his mouth. However, no grievous injury was caused to the complainant on account of said blow. There is no evidence available on record that this appellant was having common intention to murder the complainant and

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| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित -5- | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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therefore, his conviction with the aid of Section 34 of the IPC for the aforesaid offence cannot be sustained.

6. Learned counsel for the appellant Kumar Singh Thakur submits that according to the case of the prosecution, the place where the incident occurred is an open place, there is no allegation that this appellant participated in the incident in any manner except that he said to be present at the time of incident. He further submits that in an omnibus manner the complainant has stated that the accused persons came at the place of incident, however, the name of this appellant has not been mentioned by the complainant. Even there is no allegation by the complainant in the FIR that this appellant abuses the complainant with filthy language or threatened him that he will be taking his life.

7. On the other hand, learned Panel Lawyer for the State argued that there is specific allegation against the appellant Vipin Sahu by the complainant that he along with other accused persons came at the place of occurrence armed with sword, firstly they abused him by using filthy language and thereafter threatened him with life. Accused Nepali assaulted him first by fist over his mouth and thereafter, accused Vipin assaulted him with sword which he tried to stop by his hand, as a result of which

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he sustained numerous injuries over his head, back and other parts of the body. Version of the complainant is duly corroborated by the statement of Dr. Y.K. Tiwari (PW-6), who examined him on the date of incident itself and has pointed out in all 14 injuries over his person, as described in injury report Ex.P-11. So far as the involvement of other accused persons is concerned, it has been argued that the complainant has categorically stated that all the three accused persons came together, accused Nepali opened the assault by assaulting the complainant by fist on his mouth and thereafter accused Vipin assaulted the complainant with sword. The fact that accused Vipin was armed with sword and all the three came together and started abusing and assaulting the victim, establishes their common intention. The nature of injuries has been described by the doctor as grievous and sufficient to cause death in the ordinary course of nature and therefore, the conviction of the appellants under the aforesaid sections is just and proper.

8. I have heard learned counsel for the parties.

9. Except complainant Basant Rao, all other witnesses examined by the prosecution have turned hostile, they have not supported

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the case of the prosecution and the conviction of the appellants is based on the statement of complainant Basant Rao (PW-1).

10. Basant Rao (PW-1) has stated that on the date of incident at about 8.00 p.m. he was sitting near the well, the accused persons came there, they were holding sword, they started saying that now-a-days his brother shows-off hooliganism and when he pleaded that his brother resides aloof from him, they started abusing him in the name of his mother & sister. Accused Vipin abused him in the name of his mother & sister and threatened him that he shall murder him today. Accused Nepali gave a fist blow on his mouth and thereafter accused Vipin started assaulting him with sword. He stopped the blow of sword with his hand as a result of which he sustained injuries on his hands and forehead. He sustained injuries on his back & right leg and as a result of these injuries he fell on the ground and blood started oozing. He lodged the report in the police station. He was sent for medical examination. He was admitted in the hospital for a period of 23 days. The defence has tried to impeach the credibility of this witness by suggesting that he was convicted under Section 302 of the IPC and that he is engaged in the illegal trade of liquor. He stoutly denied the

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suggestion that he was sitting at the place of incident armed with sword for the accused person and when he was engaged in the scuffle with the accused persons, he fell on the screen of well as a result of which he sustained the injuries. He has also denied the suggestion that attack was initiated by him. However, in the cross-examination on behalf of accused Pintoo @ Nepali he has admitted that because of blow over his mouth his tooth was not broken nor his lips were cut.

11. Dr. Y.K. Tiwari (PW-6) has proved the injury report of Ex.P-11, query report of Ex.P-12, X-ray report of Ex.P-14 as also the opinion of Ex.P-15 about the weapon of offence i.e. sword. In the cross-examination, the doctor has described all the injuries sustained by the victim Basant Rao and also stated that he had opined in reply to the query that injuries were sufficient to cause death in the ordinary course of nature.

12. Thus, from the statement of complainant Basant Rao (PW-1) and Dr. Y.K. Tiwari (PW-6) it is established that injuries caused to the complainant Basant Rao was sufficient to cause death in the ordinary course of nature.

13. So far as the involvement of the appellants in crime in question is concerned, after going through the statement of the

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complainant it appears that there is no allegation against appellant Kumar Singh Thakur that he participated in the beating or in any manner he abused or threatened the complainant at the time of incident. The only allegation against him is that the complainant has stated that he identifies the accused persons and they came at about 8.00 p.m. when he was sitting near the well. Other allegations are against the appellant Vipin Sahu. Therefore, on the basis of evidence of PW-1 Basant Sahu, appellant Kumar Singh Thakur could not have been convicted with the aid of Section 34 of the IPC.

14. So far as the involvement of appellant Pintoo @ Nepali is concerned, the complainant has categorically stated that accused persons came there, appellant Vipin started abusing him with filthy language and threatened him that he shall murder him and thereafter accused Nepali gave fist blow on his mouth and only after the assault of Nepali, accused Vipin inflicted numerous sword blows over the person of complainant. The complainant has denied the suggestion given on behalf of this appellant that Nepali was simply watching the incident, as of others, and he did not participate in the incident. The name of accused Nepali also figures in the FIR wherein it has been

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mentioned that he assaulted the complainant with the fist over his mouth. Thus, the prosecution on the basis of statement of complainant Basant Rao (PW-1), which is corroborated by the medical evidence as also from the promptly lodged FIR, has been able to establish the involvement of appellant Vipin Sahu & Pintoo @ Nepali in the crime in question and their conviction with the aid of Section 34 of the IPC is based trustworthy and reliable evidence.

15. At this stage, learned counsel for appellants Vipin Sahu & Pintoo @ Nepali submit that the appellants are in custody since 26.12.2002 and thereby they have completed almost 5 years of jail sentence, therefore, they may be sentenced to the period already undergone by them.

16. In the result;

a. Criminal Appeal No.1302/03 preferred by appellant Kumar Singh Thakur is allowed. His conviction under Sections 294/34, 506 (Part-2)/34 & 307/34 of the IPC and sentences imposed under those sections are hereby set aside and he is acquitted of the above charges. It is stated that appellant Kumar Singh Thakur is on bail, therefore, his bail bonds are discharged.

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| | b. Criminal Appeal No.1298/03 preferred by appellants Vipin Kumar Sahu and Pintu @ Nepali @ Balbahadur Thapa are partly allowed. Their conviction under Section 307/34 of IPC is maintained, however, the jail sentence imposed upon them is hereby modified to R.I. for 8 year. However, conviction and sentences imposed upon them under other sections are hereby maintained.<br><br>Sd/-<br>DHIRENDRA MISHRA<br>Judge | |

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